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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 412

SALVATORE SHILLITANI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 442

ANDIMO PAPPADIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Shillitani* (No. 412) (2 S.R. 71–76)[1] is reported at 345 F. 2d

[1] The printed record in *Shillitani* v. *United States*, No. 412, although in one volume, has two separate paginations. The first 24 pages are designated as "1 S.R.". The last 79 pages, which commence with the appendix filed by the government in the court below, are designated as "2 S.R.". References to the record in *Pappadio* v. *United States*, No. 442, are prefixed "P.R.".

290. The opinion of the court of appeals in *Pappadio* (No. 442) (P.R. 220–226) is reported at 346 F. 2d 5. The opinion of the district court in *Pappadio* (P.R. 70–78) is reported at 235 F. Supp. 887.

JURISDICTION

The judgment of the court of appeals in *Shillitani* was entered on May 18, 1965 (2 S.R. 77) and in *Pappadio* on May 24, 1965 (P.R. 227). A petition for rehearing filed by Pappadio was denied on June 21, 1965 (P.R. 228). On June 29, 1965, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari in *Shillitani* to and including August 3, 1965 (2 S.R. 78), and on July 6, 1965, extended the time within which to file a petition for a writ of certiorari in *Pappadio* to and including August 19, 1965 (P.R. 229). The petition for a writ of certiorari in *Shillitani* was filed on July 31, 1965, and in *Pappadio* on August 10, 1965, and both petitions were granted on November 15, 1965 (2 S.R. 78–79; P.R. 230). 382 U.S. 913, 916. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a charge of contempt in refusing to answer questions before the grand jury requires a jury trial (Nos. 412 and 442) and an indictment (No. 412).

2. Whether the "admixture of civil and criminal contempt" invalidates the judgment of conviction (No. 412).

3. Whether it was constitutionally permissible for the district court to impose two-year sentences.

4. Whether the two-year sentence imposed on Pappadio was reasonable (No. 442).

RULE INVOLVED

Rule 42, Federal Rules of Criminal Procedure provides in pertinent part:

* * * * *

> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment.

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STATEMENT

Shillitani v. *United States*, No. 412

On August 10, 1964, in the Southern District of New York, in a proceeding under Rule 42(b), F.R. Crim. P., petitioner was found guilty of contempt for willfully disobeying an order to answer certain questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for two years with the proviso that if he should answer the questions prior to the discharge of the grand jury, a further order "may be made terminating the sentence" (1 S.R. 21–22).

In February, April and May 1964, petitioner had appeared before the grand jury under subpoena and had refused to answer questions on the ground that the answers would incriminate him (2 S.R. 2–4, 8, 11–13, 14–18). On July 1, 1964, government counsel applied to Judge Wyatt for an order directing petitioner to testify before the grand jury under the immunity provisions of 18 U.S.C. 1406 (1 S.R. 3–6, 2 S.R. 66–70). Judge Wyatt instructed petitioner that he was being granted "full and absolute immunity" and that a failure to answer the questions would subject him to contempt proceedings (1 S.R. 6). The court read to petitioner the questions which it ordered him to answer (1 S.R. 14–19). On July 2 and again on August 4, 1964, petitioner reappeared before the grand jury and refused to answer the questions (2 S.R. 19–26, 27–33).

On August 10, 1964, upon oral notice and upon an order to show cause, petitioner was brought before

Judge MacMahon on a charge that he was in contempt of court (2 S.R 39–42, 44, 56; 1 S.R. 1). A hearing was held before Judge MacMahon. No request for a jury trial was made. After requesting dismissal on the ground that the government had failed to prove a *prima facie* case, petitioner rested (2 S.R. 54–55).

The court found petitioner guilty of criminal contempt for his willful disobedience of the court order during his appearances before the grand jury on July 2, 1964, and on August 4, 1964 (2 S.R. 56–59). The court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the grand jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment" (1 S.R. 21–22).[2] In affirming, the court of appeals construed this language to mean that petitioner had an unqualified right to be released if he obeyed the order of the district court (2 S.R. 76).

Pappadio v. *United States*, No. 442

On October 30, 1964, in the Southern District of New York, in a proceeding prosecuted on written notice, petitioner was found guilty of contempt for willfully disobeying an order to answer certain

[2] The court first said (2 S.R. 61): "I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you."

questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for two years with the proviso that if he should answer the questions prior to the discharge of the grand jury "the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217–218).

In February, April and May 1964, petitioner had appeared before the grand jury under subpoena and had refused, on the ground of self-incrimination, to answer numerous questions (P.R. 97–109). During one of these appearances he was told that there had been testimony before a Senate committee and statements to law-enforcement officers that a person named Thomas Lucchese was the head of a group of people engaged in a number of illegal activities, including the illicit narcotics traffic, and that it had been alleged that petitioner was a member of that particular group (P.R. 102).

On August 4, 1964, petitioner was granted immunity under the provisions of the Narcotic Control Act of 1956, 18 U.S.C. 1406, and directed to answer the questions which he had previously refused to answer (P.R. 110–117). At a subsequent appearance before the grand jury on that day and again on October 6, 1964, he again declined to answer all questions except identifying questions as to name, residence and age, predicating his refusal on the First and Fifth Amendments (P.R. 118–135).

On October 8, 1964, the grand jury asked the court again to instruct petitioner to answer the questions.

His attorney contended that petitioner should not be called as a grand jury witness so long as a 1958 indictment was pending against him which charged him with conspiracy to violate the narcotic laws[3] (P.R. 136–141). His attorney also made objections to particular questions (P.R. 150–160). The court ruled that the outstanding indictment did not justify petitioner's refusal to answer since 18 U.S.C. 1406 expressly provided that the immunity it grants, both as to prosecution and as to use of testimony, covers any criminal proceeding against a defendant in any court (P.R. 143). It also overruled the objections to the questions (P.R. 163–165) and directed the witness to answer all questions previously asked (P.R. 167).

The next day and again on October 13, petitioner appeared before the grand jury (P.R. 170–189). He answered a number of questions, frequently consulting his attorney before answering. He admitted that he knew Lucchese and denied that he knew anyone who dealt in narcotics (P.R. 175). He testified that, since he had been served with the grand jury subpoena, he had met Lucchese a few times on the street and that they had met with lawyers on a few occasions (P.R. 185–186). After consulting with counsel, petitioner refused to identify the lawyer or state who else was present at the meetings. He also declined

[3] Petitioner had been severed before the case went to trial (P.R. 140). The case against the defendants who were tried is reported in *United States* v. *Aviles*, 274 F. 2d 179 (C.A. 2), certiorari denied, 362 U.S. 974; see also the ruling on the motion for a new trial, 337 F. 2d 552, certiorari denied, 380 U.S. 906. The indictment against petitioner was recently dismissed.

to tell where the meetings took place (P.R. 186–188). The grand jury again sought an order directing petitioner to answer these questions (P.R. 190–196). Petitioner's attorney objected to the questions, contending that they interfered with the attorney-client privilege and were not relevant to the grand jury inquiry (P.R. 196–200). The judge, directing petitioner to answer, explained to him that the attorney-client privilege applied to conversations between lawyer and client, but that the prosecutor had the right to ask when and where he met the lawyer, and whether anybody else was present (P.R. 201–202, 209). Petitioner thereafter said that the meetings were in the afternoon and that they could have lasted a couple of hours, but he again declined to say where the meetings took place or who was present (P.R. 210–211).

An order was issued to show cause why petitioner should not be punished for contempt (P.R. 3–6). Petitioner, in his reply, claimed that he was not required to answer on the grounds that the questions were not relevant; that there was an outstanding indictment against him, that the answers already given might be the subject of a trial for perjury; and that answers to the questions would interfere with the attorney-client relationship (P.R. 7–32). Petitioner repeated these arguments at the hearing on the order to show cause (P.R. 33–46, 60–61). Petitioner demanded a jury trial (P.R. 34), but did not contest the fact that he had refused to answer the questions at issue (P.R. 38–41, 51, 68). The court found petitioner in contempt for refusing to answer five ques-

tions (P.R. 74–75).[4] The court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the Grand Jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said Grand Jury, whichever may first occur, the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217–218).[5] The court of appeals affirmed the conviction (P.R. 220–226).

SUMMARY OF ARGUMENT

These cases again present for this Court's determination the question whether, and to what extent if at all, the Constitution requires a jury trial for charges of criminal contempt. Having surveyed the decisional law and the constitutional history in our briefs in cases recently heard by this Court—including *Harris* v. *United States*, No. 6, this Term (382 U.S. 162)—we do not believe it appropriate or necessary to repeat in full the arguments previously presented. Insofar as these cases raise again the validity of the

[4] These questions are as follows:

"Mr. Pappadio, who are the attorneys who were present at these meetings?

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?

"All right; how many of such meetings were there?

"Where did the meetings take place?"

[5] The court of appeals, six days earlier, in affirming the conviction in *Shillitani*, had construed a similar sentence to mean that the contemnor had an unqualified right to be released if he obeyed the order of the district court (2 S.R. 76).

dictum of some of the Justices in *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12, we refer the Court to our brief in *Harris*, which is particularly addressed to the historical premises on which that *dictum* rests. Since the limitation on the permissible contempt sentence which that *dictum* prescribes can be justified, as a matter of constitutional interpretation, only on historical grounds, we submit that it stands or falls on the historical evidence. For reasons stated in detail in our brief in *Harris*, we believe that history conclusively demonstrates that the *dictum*'s premises are unsound.

I

In the cases now before the Court, we address ourselves principally to questions of policy. We believe that there are sound contemporary justifications for the oft-repeated rule that criminal contempts are not "criminal prosecutions" for purposes of the constitutional right to a jury trial.

A. An ordinary "criminal prosecution" arises out of the violation of a legislative command, and our legal system has always recognized that there is a greater need to obtain certain compliance with court orders than with legislative directives. All the Justices of this Court have expressed the view that a person subject to a court order may be imprisoned so as to compel him to obey the order; the same is obviously not true of a potential violation of a statute. Although criminal contempt is, as of the time when it is imposed, retrospective in nature in that it punishes past disobedience, we do not believe that it

can be properly analyzed by isolating it from the entire proceeding of which it is a part. The threat of a criminal contempt sanction often is the only compelling force that can be practically applied to obtain obedience to a court order. Orders which regulate a course of conduct cannot usually be enforced by civil contempt, and it is only the threat of certain punishment which coerces compliance. If the implementation of that threat becomes unsure, compliance with these orders is accordingly rendered doubtful. The Constitutional draftsmen apparently recognized that the enforcement of court orders must be treated differently from the enforcement of statutes because they plainly distinguished in the first Judiciary Act between the power to punish for crimes and the power to punish for contempts.

B. Juries serve a different function in trying statutory violations than they would if they were required to try contempts. Factual and legal issues have usually been exhaustively refined before a court order issues, and the jury would not have the duty in a contempt proceeding of applying a general law to a specific factual situation. Indeed, in many contempts there are no facts to be resolved, and the jury therefore would serve no purpose whatever.

C. The harm done to a rule of law by a jury's "nullification" of a court order would be much more substantial than the harm done by the failure to implement a statute. Court orders characteristically protect adjudicated private rights, and enforcement of an individual's constitutional or legal right ought

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not to depend on the popular will reflected in a jury verdict. Moreover, respect for law is more likely to be undermined if disobedience of a particularized court order, directed to a specific defendant in a specific factual context, goes unpunished than if a generalized legislative judgment occasionally goes unenforced.

II

The facts of these cases illustrate the above principles. Both *Pappadio* and *Shillitani* involve refusals to obey orders to testify. Such orders rest upon judicial powers which are basic to the operation of our legal system. Courts must have the ability to compel the testimony of those who have no lawful reason to refuse to testify. And these cases demonstrate that civil contempt is not always a practical means of enforcing such orders. When a trial is short or a grand jury's term is about to expire, coercive imprisonment may be a totally inadequate means of forcing the witness to obey the order. In neither of these cases would a jury be able to carry out the traditional jury function of finding facts since no facts were in issue. In both these cases a criminal sanction was reasonably believed necessary, but in order to tailor the sanction to the wrong which had been committed, the sentencing judges included purge clauses authorizing the release of petitioners if they subsequently complied. Since criminal procedures were followed, petitioners were not prejudiced by this added condition.

Nor does the fact that the contumacious conduct was committed out of the presence of the court war-

rant a jury trial. Whether the contempt is committed in the court's presence determines whether notice and a hearing are required, not whether the conduct constituted a "crime" in the constitutional sense. And since no statute or rule limits permissible punishment or prescribes jury trial, there is no occasion for this Court's exercise of a supervisory power either to require jury trial or to place a fixed limit upon the permissible sentence.

III

The reasonableness of petitioner Pappadio's two-year sentence is reviewable in this Court, which must consider the willfulness of the contempt, the seriousness of the offense, and the public interest in obtaining compliance. We think the district court's judgment is supportable in light of the extensive narcotics conspiracy which was being investigated by the grand jury and the possibility that petitioner Pappadio's refusal was part of a concerted plan to hinder the investigation.

ARGUMENT

INTRODUCTION

These cases, together with *Cheff* v. *Schnackenberg*, No. 67, this Term, again present the question resolved by this Court in *United States* v. *Barnett*, 376 U.S. 681, in *Green* v. *United States*, 356 U.S. 165, and in many prior decisions reviewed in *Green*—*i.e.*, whether criminal contempts are "crimes" or "criminal prosecutions" within the meaning of Article III, Section 2 or the Sixth Amendment of the Constitution, so as to

entitle an alleged contemnor to a jury trial as a matter of right. In addition, the judgments in the three cases turn on the validity and reach of the *dictum* of some of the Justices in *United States* v. *Barnett,* 376 U.S. 681, 695, n. 12, that "punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." The terms of imprisonment imposed in *Pappadio* and *Shillitani* exceed the statutory maximum for petty offenses, and that in *Cheff* is the maximum authorized by the petty-offense statute, 18 U.S.C. 1(3).

We will not attempt in these briefs to repeat the arguments and the survey of prior decisions contained in our briefs in *United States* v. *Barnett,* No. 107, O.T., 1963, and in *Green* v. *United States,* No. 100, O.T., 1957. And insofar as the detailed discussion of historical sources contained in our brief and appendix in *Harris* v. *United States,* No. 6, this Term, (382 U.S. 162), is relevant here, we respectfully refer the Court to those papers, which have been served on petitioners in these cases. The issues which remain to be discussed, in our view, concern the practical contemporary justification for the holding in *Barnett* and in the more than fifty cases cited therein which "support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense." 376 U.S. at 694.

We believe that the holding of *Barnett* and *Green* rests firmly not only upon the constitutional history and the consistent course of decisional law elaborated in our earlier briefs, but also upon sound policies regarding the administration of justice. In short,

it is our position that disobedience of a court order, whether or not committed in the presence of the court, may and should be appropriately punished without the intervention of a jury. The cases now before the Court present, in our view, apt illustrations of the problems of judicial administration which may arise when court orders are disobeyed. They also demonstrate why the usual mode of trying criminal offenses—*i.e.*, by indictment and upon the verdict of a jury—is unsuited to the trial of criminal contempts.

We note preliminarily that in our brief in *Harris* v. *United States*, No. 6, this Term, we discussed at length the reasons why, on the basis of the colonial materials printed in the appendix to that brief, we believe that this Court should reject the *dictum* in the Court's majority opinion in *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12. As we explain in *Harris*, we find no basis for the assumption that the constitutional draftsmen believed criminal contempt to be "a species of petty offense punishable by trivial penalties" (376 U.S. at 752 (Goldberg, J., dissenting)) or for the corollary proposition that criminal contempts were tried without juries in colonial days because the permissible punishments did not exceed the limits of the petty-offense jurisdiction. Blackstone's *Commentaries*, which was the authoritative exposition of the common law for judges and attorneys at the time of the adoption of the Constitution, explicitly treated contempts separately from petty offenses. Blackstone's justification for summary proceedings in contempt cases differed substantially from the stated reasons

underlying summary proceedings for "disorderly offenses."

The colonial and early State statutes also rebut any assertion that a general limitation was imposed on the permissible punishment for criminal contempt. Certain kinds of contempt, such as breaches of courtroom decorum or failure of jurors or witnesses to respond to summonses, sometimes carried explicit statutory penalties. But we have found no limitation whatever, in any colonial act, on the power of a court to punish for disobedience of its order, and the only two statutes covering such a situation apparently authorize indefinite imprisonment. While most contempt cases in colonial times (as has been true since) concerned relatively minor infractions which were punished with lesser penalties, serious contempts subjected violators to heavy fine, substantial imprisonment or other grave punishment.

Particularly enlightening are the early statutes setting the limits of petty offense jurisdiction. If these limits are compared with punishments authorized or actually imposed for criminal contempt, it becomes clear that it was never considered by the colonists that there was any relation between a grave or flagrant contempt and the class of petty offenses traditionally triable without jury.

We believe that this consistently held view rests on an appreciation of the unique function and character of contempt proceedings, both of which render such proceedings *sui generis*. Our position is that the

procedures constitutionally prescribed for "crimes" and "criminal prosecutions" do not apply when the conduct being punished is violation of a court order. In other words, the policies which underlie the guarantees of Article III and the Sixth Amendment extend only to punishment for violation of a statute and not for disobedience of a court order. It is, of course, true that in the case of both legislative and judicial commands punishment is imposed on violators as a means of deterring other offenders and compelling obedience in the first instance. But there are critical distinctions between statutes and court orders in (1) the nature of the underlying command, (2) the refinement of the particular issues of fact and law before the duty to obey is imposed, and (3) the necessity, in the administration of a rule of law, for the certain punishment of those who disobey. The greater societal interest in obtaining obedience to court orders as compared to general statutes has always been thought to justify extraordinary coercive remedies for the former which have not been deemed permissible for the latter. These differences underlie the distinctive procedures which have traditionally been utilized in adjudicating charges of contempt. They distinguish contempt from the "crimes" and "criminal prosecutions" which the Constitutional draftsmen contemplated when they secured a defendant's right to trial by jury by expressly including the guarantee in Article III and the Sixth Amendment.

I

A CRIMINAL CONTEMPT PROCEEDING IS NOT A "CRIMINAL PROSECUTION" IN THE CONSTITUTIONAL SENSE

A. THE POWER TO PUNISH DISOBEDIENCE OF COURT ORDERS DIFFERS FROM THE POWER TO PUNISH VIOLATIONS OF LEGISLATIVE COMMANDS

In *Ex parte Robinson,* 19 Wall. 505, 510, this Court observed:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed with this power. * * *

The justification for this "inherent" power is obvious. Courts are in the business of adjudicating disputes, and they must, in an orderly society, possess the power to effectuate their judgments and impose them, where necessary, upon unwilling parties. Compliance with court orders which are likely to be disobeyed may, of course, be compelled in either of two ways:

(1) The execution of a sanction such as fine or imprisonment may be conditioned by the court upon compliance with the court order. This is the traditional form of civil contempt, which has been recognized as constitutionally permissible pursuant to summary procedures even by those members of the Court who have expressed the view that criminal contempt

must constitutionally be tried to a jury. See, *e.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258, 330–332 (Black and Douglas, JJ.,); *Green* v. *United States*, 356 U.S. 165, 197–198 (The Chief Justice, Black, Douglas, JJ., dissenting); *United States* v. *Barnett*, 376 U.S. 681, 727–728, n. 6 (Black and Douglas, JJ., dissenting), 753–754 (The Chief Justice, Douglas, Goldberg, JJ., dissenting).

(2) The threat of an indefinite future sanction, such as fine or imprisonment, as punishment for disobedience may be invoked as a means of compelling present compliance with a court order. This latter course, which amounts to criminal contempt, relies, of course, on the kind of deterrence customary in the criminal law—*i.e.*, those subject to the duty imposed by the law are warned that disobedience, if there is any, will be punished after it occurs.

Both civil and criminal contempt share the common objective of compelling obedience to a court order. In civil contempt the actual sanction is presently imposed to prevent a violation; in criminal contempt the *threat* of a sanction is the contemplated deterrent and the sanction itself is merely the realization of the threat. As of the time the imprisonment or fine is executed there is a difference between civil and criminal contempt—the former is then prospective (it looks to future compliance) while the latter is retrospective (it rests upon past disobedience). As this Court observed in *Penfield Co.* v. *Securities and Exchange Commission*, 330 U.S. 585, 594: "When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coer-

cive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct." But in terms of the complete process viewed as of the time of the entry of the original court order, civil and criminal contempt are nothing more than alternative methods of deterring disobedience.[6] The execution of the latter sanction occurs, of course, after the order has been violated, in order to demonstrate to others that the threat is not an empty one. But it is an integral part of the coercive machinery which courts must have at their disposal to obtain compliance with their orders.

Court orders are clearly different in this regard from legislative mandates. There is no "inherent" power to coerce obedience to statutory directives. The legislature, which expresses the majority's will in a statute, may authorize violators of the legislative command to be imprisoned or fined *after* they commit their violations. But there is no power with respect to legislative judgments analogous to civil contempt—*i.e.*, to "the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order." *Green* v. *United States*, 356 U.S. 165, 197 (Black, J., dissenting). An indi-

[6] We can see, for example, no practical difference between the conditional imposition of a fine such as that sustained as civil contempt by this Court in *United States* v. *United Mine Workers*, 330 U.S. 258, and a warning that a fine will be imposed as a criminal penalty if the order is disobeyed. The purpose of both is to coerce compliance, and the need to implement the threatened sanction is no greater in the former case than in the latter. Cf. Note, *Procedures for Trying Contempts in the Federal Courts*, 73 Harv. L. Rev. 353, 355–356 (1959).

vidual who has failed to file income-tax returns in past years may not, for example, be imprisoned until he files a current return. That is true, we submit, because under our legal system there is not as immediate an interest in obtaining compliance with legislative commands as there is in coercing obedience to the more specific directives which arise out of the formal adjudication of a particularized controversy. Consequently, criminal prosecution after the commission of an offense of those violating a statute is deemed an adequate deterrent for other potential lawbreakers. In the case of court orders, on the other hand, the specific public or private rights which are protected require more certain enforcement than the usual criminal remedy can provide.

As this Court has pointed out, in many instances "Contempts are neither wholly civil nor altogether criminal." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441, and "particular acts do not always readily lead themselves to classification as civil or criminal contempts," *McCrone* v. *United States*, 307 U.S. 61, 64. Where a person refuses to perform an act which he has been ordered to do, it may be possible to imprison him until he complies with the order. If, on the other hand, he has done an act which he has been forbidden to do, compliance may no longer be possible and the harm may already have been done. Civil contempt then has no function to serve and only punishment is appropriate. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418; *United States* v. *United Mine Workers*, 330 U.S. 258; *Penfield Co.* v. *Securities and Exchange Commission*,

330 U.S. 585; Note, *Civil and Criminal Contempt in the Federal Courts,* 57 Yale L. J. 83, 90–95; Rapalje, *Contempts* § 21 (1884). The punishment is not merely retributive, however. It serves as a deterrent to others and prevents future violations. The knowledge that swift punishment will follow deliberate disobedience is obviously an effective deterrent.

This is particularly significant because not every court order lends itself to enforcement by civil contempt. Recognizing, as this Court long ago observed, that in compelling obedience to their decrees courts must exercise "the least possible power adequate to the end proposed" (*Anderson* v. *Dunn,* 6 Wheat. 204, 231; *In re Michael,* 326 U.S. 224, 227), we agree that if it is practical to obtain compliance in a manner whereby defendants "carry the keys of their prison in their own pockets" (*In re Nevitt,* 117 Fed. 448, 461), it might be an abuse of discretion for a court to invoke the more stringent remedy of criminal contempt. But that does not, in our view, mean that if civil contempt is an inadequate or impractical method of securing compliance with a particular court order, the threat of punishment for disobedience—which is the real goad to compliance—may be implemented only in the manner prescribed for violations of legislative mandates.

The impracticality of relying upon civil contempt in certain instances is demonstrated by the cases now before the Court. See pp. 35–37, *infra,* and our brief in *Cheff* v. *Schnackenberg,* No. 67, this Term, pp. 11–19; see also our brief in *Harris* v. *United States,* No. 6, this Term, pp. 21–23. A simple hypo-

thetical can demonstrate the imbalance which would be introduced into the law if this Court were to hold that criminal contempt is subject to the procedural safeguards prescribed by the Constitution for the trial of violations of legislative enactments. If, in an action between adjoining landowners over two trees growing on one party's property near their common boundary, a court were to conclude that one tree constituted a nuisance and should be removed by its owner but that the owner was entitled to undisturbed enjoyment of the other, it could enforce its decree against the owner—if he did not voluntarily comply with the order to remove one tree—by imprisoning him until he had the tree removed. With respect to the neighbor's obligation not to interfere with enjoyment of the other tree, the court would be unable to compel compliance by the sanction of civil contempt. The only effective remedy would be the threat of imprisonment in case of disobedience, and implementation of that threat would constitute criminal contempt.[7] It is obvious that the order would be substantially less effective against the neighbor than against the owner. It would, we submit, be consistent with the rule that the court should exercise

[7] Conditioning a term of imprisonment on disobedience—*i.e.*, announcing in advance that each contempt will be punished by a definite term of imprisonment—would not, in our view, change the nature of the proceeding from criminal to civil contempt. If imprisonment is imposed *after* disobedience, even if it has, under a prior order of the court, been conditioned on disobedience, it constitutes punishment. See *Clay* v. *Waters*, 178 Fed. 385 (C.A. 8); *Abrams* v. *United States*, 64 F. 2d 22, 23 (C.A. 2); *United States* v. *Rosen*, 174 F. 2d 187 (C.A. 2), certiorari denied, 338 U.S. 851.

only "the least possible power adequate to the end proposed" (*Anderson* v. *Dunn*, 6 Wheat. 204, 231) if the criminal contempt sanction applicable to the neighbor were made as speedy, certain and effective as the civil contempt sanction available with respect to the owner. That is patently not the result if criminal contempt is treated no differently from violation of a criminal statute.

The difference between sanctions to be imposed for violations of legislative enactments and for violations of court orders was recognized by the Judiciary Act of 1789, 1 Stat. 73. This circumstance is of obvious importance in the interpretation of Constitutional guarantees since the Act was drawn by men who had lived through the adoption of the Constitution and considered the objections thereto. The power to punish for contempt is set forth in the Judiciary Act, which created the federal courts, and not in the Crimes Act of 1790, 1 Stat. 112, which defined federal crimes. In Sections 9, 11 and 12 of the Judiciary Act, Congress gave the district and circuit courts jurisdiction over crimes and civil actions and provided that trial of issues of fact in these actions shall be by jury. Jurisdiction over contempts was not covered by these sections but was treated separately in Section 17, which provided that the courts shall have power to punish "by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same * * *." 1 Stat. 83. The draftsmen of the federal statute, like those responsible for colonial and State legislation, obviously did not treat contempt as a "crime." They considered a

court's authority to punish for contempt to be a distinct power, quite separate and apart from ordinary criminal jurisdiction. Moreover, the draftsmen of these federal statutes not only treated contempt as different from "crimes" but they combined criminal and civil contempt in one authorizing provision. Cf. *Penfield Co.* v. *Securities and Exchange Commission,* 330 U.S. 585, 594. See also *Nelson* v. *Steiner,* 279 F. 2d 944 (C.A. 7); *National Labor Relations Board* v. *Deena Artware,* 261 F. 2d 503 (C.A. 6), reversed on other grounds, 361 U.S. 398. This, we believe, shows that the framers considered a court's authority with respect to all forms of contempt to be a distinct power, separate and apart from its ordinary criminal jurisdiction.

United States v. *Hudson,* 7 Cranch 31, decided in 1812, reinforces this conclusion. The Court there rejected the suggestion that federal courts were empowered to punish common-law crimes. Mr. Justice Johnson distinguished, in that case, between ordinary criminal jurisdiction—as to which "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence" (7 Cranch at 33–34)—and the "implied powers [which] must necessarily result to our courts of justice, from the nature of their institution" (*ibid.*), such as the power to punish for contempt. We submit that in providing for trial by jury of all "crimes" or in all "criminal prosecutions" in Article III and the Sixth Amendment, the Constitutional draftsmen had in mind only the former class—*i.e.,* crimes created by "the legislative authority." They were not intending to encroach on the

"implied powers" of courts of justice to deal appropriately with those who disobeyed court orders.

This conclusion is further reinforced by the fact that, although a court's contempt jurisdiction is personal, enabling courts to punish for contempts wherever they are committed (*e.g., Blackmer* v. *United States,* 284 U.S. 421, 438–440), Article III provides that trials for "Crimes" "shall be held in the State where the said Crimes shall have been committed," and the Sixth Amendment provides that juries in "criminal prosecutions" be "of the State and district wherein the said crime shall have been committed." Such coupling of jury-trial provisions with territorial limitations appropriate in "criminal prosecutions" but inappropriate in proceedings for contempt, demonstrates the purpose of the drafters that Article III and the Sixth Amendment not apply to contempt proceedings.

B. THE FUNCTION OF A FACT-FINDER IN CRIMINAL CONTEMPT PROCEEDINGS CHARACTERISTICALLY DIFFERS FROM THAT IN ORDINARY CRIMINAL PROSECUTIONS

Criminal contempt is also different from ordinary criminal prosecutions for statutory violations because the alleged contemnor has customarily been through an extensive legal and factual inquiry in which he has had the opportunity to refine the issues, present his position to the court and determine the precise nature of his legal obligation. As these cases and *Cheff* demonstrate (pp. 39–41, *infra; Cheff* brief, pp. 12, 16–17), a contempt action for willful disobedience of an order of a court does not normally arise until the scope

and terms of the order have been fixed in prior proceedings in which the defendant has had the benefit of counsel. The defendant therefore can be said to have had counsel available even as he committed the acts constituting criminal contempt. In many instances (including the willful refusal to testify involved in these cases), the disobedience of the order represents a continued refusal to abide by the legal adjudications made before the order was issued. In ordinary criminal prosecutions on the other hand, the underlying legal and factual issues have not been refined and litigated in a judicial proceeding (or an administrative one, as in *Cheff*) as they have been in a contempt proceeding. In the usual criminal case, the defendant has not had counsel present while the scope of his legal duty was being determined. Nor has the conduct required of him by law been sharply and specifically defined with reference to his individual case.

A criminal statute operates *in terrorem*. It imposes a duty and fixes punishment in terms of general applicability. An individual is subject to the criminal law even though a court has not instructed him personally that he should not perform a particular act under particular circumstances. His duty is to conduct himself in a manner consistent with the generalized command of the statute.

In this respect, jury trial serves a distinct purpose in the context of criminal prosecutions which it does not do in contempt proceedings. The jury, reflecting a consensus of the community, determines whether the generalized command of the legislature ought to apply in the particular circumstances of a defendant's case

(assuming, of course, that as a matter of statutory construction, the conduct comes within the reach of the statute). In other words, it is the function of the jury not merely to decide the facts but also to apply the law—as the trial judge explains it—to the facts. In contempt proceedings, on the other hand, the underlying court order, fixed after an adversary proceeding, imposes the particularized legal duty on a specific defendant. That stage is accompanied by the customary safeguards consistent with due process of law, including representation of the defendant by counsel of his choosing.

A defendant cannot be found guilty of contempt unless he knows or should know that a court order governing his conduct has issued. See *Pettibone* v. *United States,* 148 U.S. 197, 206–207. He does not risk punishment for inadvertent violations because he, unlike a potential criminal defendant, may obtain definitive clarification of an order from the authority which has issued it. See *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9, 15. In short, the protections provided during the stages which necessarily precede any contempt action generally leave nothing to be resolved except, perhaps, whether the defendant has violated the terms of the order.[8]

This ultimate issue of fact might, to be sure, be left to a jury for decision. But we submit that such a determination differs in kind from that which a jury is called upon to make in the ordinary criminal pros-

[8] Where the contempt consists of a refusal to testify, as it does in these cases, even that factual issue is not presented. See p. 39, *infra.*

ecution, where it not only decides the facts but reflects the community's view as to whether the generalized criminal statute ought to apply to the particular facts presented. See Note, *Procedures for Trying Contempts in the Federal Courts*, 73 Harv. L. Rev. 353, 365–366 (1959). This difference renders it less probable that the Constitutional draftsmen intended to include contempt within the meaning of "crimes" or "criminal prosecutions." Moreover, there are many instances, such as those illustrated by the present cases, in which there are no real issues of fact in the contempt proceeding. The jury's only purpose then might be to nullify the underlying court order—a function which, for reasons set out at pp. 30–33, *infra*, we believe not to be properly within the jury's province with respect to court orders. Finally, the greater interest of society in coercing compliance with court orders than with legislative commands (pp. 20–21, *supra*), which warrants imprisonment for civil contempt when a judge determines, without a jury's intervention, that a defendant is failing to comply, warrants a similar fact-finding by a judge in instances when civil contempt is an inadequate means of compelling obedience.

C. A JURY SHOULD NOT HAVE THE SAME POWER TO "NULLIFY" A COURT ORDER AS IT HAS WITH RESPECT TO CRIMINAL STATUTES

One of the protections afforded by the constitutional guarantee of jury trial in criminal prosecutions is, in the view of some commentators, the power of the jury to acquit a defendant notwithstanding undisputed and conclusive proof of guilt. See, *e.g.*, Curtis, *The Trial Judge and the Jury*, 5 Vand. L.

Rev. 150, 157–166 (1952); Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. Chi. L. Rev. 386, 411–413 (1954); cf. Devlin, *Trial by Jury* (1956), pp. 87–91. Compare *Sparf and Hansen* v. *United States*, 156 U.S. 51; *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408. Where, as in these cases, there is no disputed issue of fact, the only purpose of submitting the case to a jury would be for such possible "nullification." And in situations where issues of fact are presented, the possibility that, notwithstanding the evidence, a jury will acquit a popular defendant or frustrate enforcement of an unpopular order reduces the likelihood of compliance. However appropriate this power may be with respect to legislative enactments, we submit that it would be inconsistent with a rule of law to permit similar nullification of court orders.

In a legal system such as ours, nullification of court orders by a jury has a much more damaging effect on the rule of law than does similar nullification of statutes. A statute is essentially an expression of the majority's will as manifested by its elected representatives. It may be appropriate, therefore, that when a cross-section of the community such as a petit jury believes the law to be harsh or inapplicable to particular facts, it demonstrates the popular consensus by returning an acquittal. The administration of justice is, under this view, kept current with community thinking; by reflecting "popular prejudice" the jury "keep[s] the administration of the law in accord with the wishes and feelings of the community." Holmes, *Law in Science*

and Science in Law, 12 Harv. L. Rev. 443, 460 (1899). Since criminal punishment should be imposed only for conduct deemed reprehensible by the community, the jury acts as a check on the enforcement of obsolete or unjust laws.

Court orders, however, should not be the products of "the wishes and feelings of the community." They result from the determination of private rights and may vindicate unpopular plaintiffs or enforce legal obligations which are disagreeable to the community. Where the order is injunctive, it may well reflect a determination that a vital right is threatened by imminent and irreparable injury. It is obviously of great importance to the functioning of a legal system that orders affecting private rights issued after due adjudication be obeyed even if a majority of the community is out of sympathy with the result of the litigation or with the prevailing party. Private litigation is not a matter of popular consensus, and the rule of law requires that the effectiveness of a court order implementing a private right not depend on whether it pleases a popular majority. But if trial by jury is held to be constitutionally necessary in criminal contempt cases, there is no assurance that unpopular court orders which cannot be enforced by civil contempt will be enforceable at all. As this Court observed in *In re Debs,* 158 U.S. 564, 595: "To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

In addition, respect for the rule of law is more likely to be impaired if court orders, which represent

particularized adjudications of legal disputes, are nullified than if more general legislative enactments are disregarded. The end product of a legal system is the judgment in a particular dispute, and if such an adjudication may be disregarded with impunity by the individual upon whom the legal system has specifically imposed a duty, potential litigants will have no confidence in the system.

Moreover, the constitutional guarantee of trial by jury, when applicable, includes the requirement that the verdict be unanimous. *Maxwell* v. *Dow,* 176 U.S. 581, 586; *Andres* v. *United States,* 333 U.S. 740. Thus, if a jury trial were required in order to punish disobedience of a judicial writ or decree, a single juror lacking in sympathy with the underlying order could render it ineffective. Such a result would undermine the independence of the federal courts, which the Constitution sought to protect against the will of temporary popular majorities by providing life tenure for federal judges and prohibiting the diminution of judicial compensation.

These dangers are not nearly as grave with regard to legislation. The nullification of a criminal statute in one, or even in several, cases will undoubtedly reduce its effectiveness, but the law nonetheless remains on the statute books and may be enforced in other situations. Nullification of a court order by a jury's acquittal of a contemnor, on the other hand, can effectively wipe out the entire adjudication and deprive the prevailing party of the legal right sustained by the court.

Nor can a distinction be drawn between orders enforcing private rights and those resulting from cases in which a governmental agency is the prevailing party. If criminal contempt constitutes a "crime" for purposes of the constitutional right to jury trial in one instance, it is similarly a "crime" in the other. Moreover, suits by public agencies often protect what are, essentially, private rights. Even where the government is nominally a party, the underlying right may be a private one, so that nullification of a court order by a jury could abrogate a judicially sustained constitutional or legal right. See, *e.g.*, *United States* v. *Barnett*, 376 U.S. 681.

II

JURY TRIAL IS INAPPROPRIATE IN A CRIMINAL CONTEMPT PROCEEDING BASED ON A WITNESS' REFUSAL TO TESTIFY

A. THE DUTY OF A WITNESS TO TESTIFY IS ESSENTIAL TO THE EFFECTIVE FUNCTIONING OF COURTS

In our system of jurisprudence the fact-finding function of the courts is dependent upon the attendance of witnesses. The duties and importance of the witness to the administration of justice were described by this Court in *United States* v. *Bryan*, 339 U.S. 323, 331 as follows:

> On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of the legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds,

> in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See, e.g., *Blair* v. *United States,* 250 U.S. 273, 281 (1919); *Blackmer* v. *United States,* 284 U.S. 421, 438 (1932).

This principle is fundamental to our system in both criminal and civil suits. Indeed, the power to summon witnesses is one of the safeguards granted to criminal defendants by the Sixth Amendment along with jury trial and the right to counsel. The accused in a criminal case has the right "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor." This safeguard, like compulsory process generally, has traditionally been enforced through the contempt power. This Court has said that "a doubt has never been uttered that stubborn disobedience of the duty to answer relevant inquiries in a judicial proceeding brings into force the power of the federal courts to punish for contempt." *Brown* v. *United States,* 356 U.S. 148, 153–154. See also *Lamb* v. *Schmitt,* 285 U.S. 222, 226. Rule 17(g) of the Federal Rules of Criminal Procedure specifically provides that failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of court.

In view of this basic fact, it necessarily follows

that in a judicial system such as ours, which depends on the testimony of witnesses, the courts must have power to compel testimony. The need for this power, particularly in relation to testimony, is inherent in the ability of a court to function as such.

Testimony before a grand jury is no different, in this respect, than testimony in open court. This Court observed in *Levine* v. *United States,* 362 U.S. 610, 617, that "[t]he grand jury is an arm of the court and its *in camera* proceedings constitute 'a judicial inquiry.' " See also *Brown* v. *United States,* 359 U.S. 41, 49; *Cobbledick* v. *United States,* 309 U.S. 323, 327. The court must, therefore, have the power to compel the testimony of witnesses who wrongfully refuse to testify.

B. CIVIL CONTEMPT IS NOT AN ADEQUATE MEANS OF COMPELLING WITNESS TO TESTIFY

There is, we think, no serious disagreement with the position we have stated above—that the courts must have some inherent power to take action against a witness who wilfully refuses to give testimony. The dispute lies in whether the commitment of the witness summarily without a jury must be limited to "civil" contempt—conditional "confinement to compel future performance"—or otherwise be treated as an ordinary crime and be made triable by jury. See the dissenting opinions in *Sacher* v. *United States,* 343 U.S. 1, 22; *Green* v. *United States,* 356 U.S. 165, 197–198; *United States* v. *Barnett,* 376 U.S. 681, 727–728, n. 6, 753–754. It is said that the conditional nature of civil contempt makes tolerable the omission of

many of the procedural safeguards with which criminal proceedings are hedged. *Uphaus* v. *Wyman,* 364 U.S. 388, 403–404 (Douglas, J., dissenting).

Civil contempt is often, however, an inadequate remedy for the contumacious refusal of a witness to testify or to obey a subpoena to product records. It may not be "power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 231. The main purpose of imprisoning a recalcitrant witness may be to compel him to testify—a civil purpose. Fortuitous circumstances, however, such as the length of the trial or the short duration of the grand jury investigation may make imprisonment for the duration of the proceeding wholly insufficient as a coercive measure. See *Jurney* v. *MacCracken,* 294 U.S. 125, 151. A witness who wishes to aid or injure a party by withholding testimony may well feel emboldened to disregard his duty to testify if he knows that the only coercive sanction which can be immediately imposed is imprisonment for the duration of a short trial. Similarly, with respect to a grand jury, it is not realistic to have the effectiveness of the compulsion depend on how close to the expiration of the grand jury's term the witness happens to be called.

Moreover, the punitive and coercive aspects of contempt cannot realistically be fragmented in the case of a witness' refusal to testify. The power to compel compliance may well depend on making clear to the witness that immediate imprisonment of some duration will result from non-compliance, even if the proceeding has terminated. There is no sharp distinction between civil and criminal contempt in such a situation.

Since the available remedy of civil contempt (which may involve imprisonment of a grand jury witness for as long as eighteen months) may be imposed without a jury trial, it would be anomalous to require a jury trial where, because of the circumstances, the sentence must be cast in criminal form.[9]

These considerations, we submit, also dispose of the claim made by Shillitani that the "admixture of civil and criminal contempt" in the sentence invalidated the judgment of conviction. The judge provided that the imprisonment imposed would be terminated if Shillitani answered the question before the expiration of the grand jury's term. This clause, far from being prejudicial to his interest, gave petitioner an opportunity to reduce his prison term if he decided to purge himself of contempt. To the extent that the sentence was conditional, it was not

[9] In *Pappadio*, the court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the Grand Jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said Grand Jury, whichever may first occur, the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217–218). In *Shillitani*, the court of appeals construed similar language to mean that the contemnor had an unqualified right to be released if he obeyed the order of the district court. The trial judge thus gave petitioners a *locus penitentiae* between the time of the contempt and the end of the life of the grand jury. The terms of the sentence imposed on petitioners made it clear that the principal purpose of the sentence was to compel petitioners to testify and not to punish them for their past disobedience. Petitioners "car[ried] the keys of their prison in their own pockets" (*In re Nevitt*, 117 Fed. 448, 461), until the end of the life of the grand jury, just as if they had been found in civil contempt.

essentially different from that in which a defendant is placed on probation if he abides by certain conditions. In tax evasion cases, for example, courts have conditioned probation upon payment of all taxes and penalties lawfully due. See, *e.g.*, *United States* v. *Taylor*, 305 F. 2d 183 (C.A. 4), certiorari denied, 371 U.S. 894. The court said in *Shillitani* that the purpose of the sentence "is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you" (2 S.R. 61). The punishment was thereby fashioned to fit the purpose for which punishment is imposed. While making clear the seriousness with which the court regarded the contumacious refusal, it gave petitioner a further opportunity to comply with the order. This was, we submit, not merely permissible but actually desirable. Compare the dissenting opinion in *Brown* v. *United States*, 359 U.S. 41, 56, commenting upon the lack of a purge clause. By attaching this condition to the sentence, the court was making certain that the sanction being exercised was "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231.

Moreover, the sentence here—unlike that in *Reina* v. *United States*, 364 U.S. 507—cannot be construed as "a present adjudication of guilt for a crime to be committed in the future." 364 U.S. at 515 (Black, J., dissenting). The district judge followed the procedures prescribed by Rule 42(b) and he distinctly imposed punishment for petitioner's earlier

failure to testify. The fact that he added a condition favorable to petitioner should not be a ground for invalidating the judgment.

C. IT IS PARTICULARLY CLEAR THAT A JURY WOULD SERVE NO USEFUL FUNCTION IN A CONTEMPT CASE INVOLVING THE REFUSAL OF A WITNESS TO TESTIFY

It would be particularly inappropriate to reconsider the long line of decisions, culminating with *Barnett*, in a case involving witnesses' refusal to testify; the jury has no real function to serve in such cases. The primary duty of a jury is to resolve issues of fact. *Patton* v. *United States*, 281 U.S. 276, 312. There are normally no issues of fact where a witness refuses to testify, and this is true whether the refusal occurs in the presence of the court or, as in this case, before the grand jury. These cases aptly illustrate that proposition. Petitioners refused to testify before grand juries consisting of at least sixteen persons. Their refusals were recorded by official court reporters. It was, therefore, undisputed that they had refused to answer questions before the grand jury after being directed to do so by the court.

Nor can there be any genuine issue of wilfulness (except possibly in the case of refusal to appear). That issue would turn on whether the witness knew he was ordered to answer and intended not to obey the order. His motive for refusing is irrelevant, and he need not know that he is breaking the law. *Townsend* v. *United States*, 95 F. 2d 352, 358 (C.A.D.C., certiorari denied, 303 U.S. 664; *Fields* v.

United States, 164 F. 2d 97 (C.A.D.C.), certiorari denied, 332 U.S. 851.[10]

The genuine issues which may exist in such situations are issues of law, such as the possible scope of immunity and the pertinency of the questions. These issues are ordinarily presented and argued before the order is issued, and, in any event, they are issues which a court, rather than a jury, should determine. *Sinclair* v. *United States*, 279 U.S. 263, 298; see, also, *United States* v. *Williams*, 341 U.S. 58. The witness who refuses to testify has had the assistance of counsel on these issues not only after he is charged with contempt but before, and even while, his contempt is being committed. This circumstance tends to point up the fact that we are not here dealing with a "crime" in the normal sense in which the word is used. The fact that the action taken is one which in almost every case occurs after full opportunity to consult with counsel and after counsel has had an opportunity to present to the court all legal contentions regarding the order of the court distinguishes this type of contempt from even the rare criminal cases, such as refusal to report for military induction and contempt of Congress, in which there are no genuine issues of fact. In the criminal cases, the order which was disobeyed first comes before a court for judicial scrutiny in the criminal prosecution.

[10] Frightened silence, which this Court referred to in *Harris* v. *United States*, 382 U.S. 162, is relevant only in mitigation of sentence—an area which is entirely within the province of the sentencing judge. See *Piemonte* v. *United States*, 367 U.S. 556, 559.

But where a witness disobeys a court order to testify, there has been an opportunity for all legal and factual considerations regarding the order to be presented to the court before its issuance. Refusal to answer is, we submit, different from a "crime" in the usual sense. It is what courts have always considered contempt to be—*sui generis*."[11]

D. JURY TRIAL SHOULD NOT DEPEND ON WHETHER THE WITNESS' REFUSAL OCCURRED IN THE COURT'S PRESENCE

Petitioner Pappadio argues (Br. 18–25) that the distinction discussed by this Court in *Harris* v. *United States*, 382 U.S. 162, between contempts in the presence of the court and contempts committed outside its presence should be applied to the right to a jury trial. But that distinction, which existed at common law and is reflected in the different procedures set forth in Rule 42(a) and (b) of the Federal Rules of Criminal Procedure, has never been held to apply to any question other than whether summary procedures may be used to pun-

[11] Our argument that petitioners were not entitled to a jury trial also answers the issue raised in *Shillitani* (No. 412) that he had a constitutional right to an indictment. As this Court said in rejecting this contention in *Green* v. *United States*, 356 U.S. 165, 184–185:

"* * * It would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over one year are 'infamous crimes' under the Fifth Amendment although they are neither 'crimes' nor 'criminal prosecutions' for the purpose of jury trial within the meaning of Art. III, § 2, and the Sixth Amendment."

It is significant that even where Congress has provided for jury trials in contempt cases (see 18 U.S.C. 3692) it has not thought it necessary to require grand jury indictment.

ish the contempt. If the contempt is committed in the presence of the court, the court has power to act immediately, without notice and hearing. Where the contempt is committed outside the presence of the court, the court must provide notice and hearing. It has never been suggested that the requirement of more deliberate procedures rendered the latter form of contempt a "crime" or "criminal prosecution" for purposes of the constitutional right to a jury trial. The *Harris* case held only that the contempt committed there could be punished under Rule 42(b) and not, by causing it to be repeated in open court, under Rule 42(a).

E. THIS COURT SHOULD NOT EXERCISE ITS SUPERVISORY POWER TO SET A FIXED LIMIT UPON CONTEMPT SENTENCES OR TO REQUIRE JURY TRIALS FOR CERTAIN KINDS OF CONTEMPT

Petitioner Pappadio also argues that, regardless of constitutional authority, this Court should impose a six-month limitation on punishment without a jury trial or require jury trials for contempts committed outside the presence of the court in the exercise of its supervisory power over the federal courts. The supervisory power, however, has heretofore been exercised only where standards for official action are established by the Constitution, by statute or by rule, and where no sanction is explicitly provided in case of their violation. In effect, courts thereby carry out a constitutional or statutory mandate. See *On Lee* v. *United States,* 343 U.S. 747, 754–756. Compare *McNabb* v. *United States,* 318 U.S. 332; *Ballard* v. *United States,* 329 U.S. 187; *Elkins* v. *United States,* 364 U.S. 206. That is not true of the present case.

Nor, we submit, is there any reason to impose either of petitioner's limitations on the law of contempt since the existing standard of reasonableness, which governs the imposition of sentences for criminal contempt, is an adequate safeguard. In the first Judiciary Act Congress gave to the courts power to punish "by fine or imprisonment at the discretion of said courts, all contempts of authority in any cause or hearing before the same." That Congress, implementing a Constitution which was designed to last through changing conditions, apparently recognized that contempts of court can be so varied that no definite penalty can appropriately be fixed.[12] As a result, the statutory authority to punish for contempt by fine or imprisonment has remained unchanged since 1789 despite changed conditions, including the growth of administrative agencies which often rely on the courts' contempt power in various stages of their operations. There is no reason now to limit, by a Court-imposed rule, this flexible power which has served the courts for a century and a half.

Moreover, there is a safeguard against the possibility of misuse of the contempt power in that, unlike the situation in criminal prosecutions, sentences for contempt are subject to appellate review. See, *e.g.*, *Green* v. *United States,* 356 U.S. 165, 187–188; *United States* v. *United Mine Workers,* 330 U.S. 258. There is thus no reason to fear that excessive uncorrectible

[12] Many contempts, to be sure, are relatively minor. Others, however, are grave. One of the Justices described the contempt alleged in the *Barnett* case as "extraordinarily serious, among the most serious in this Nation's history" (376 U.S. at 758).

punishments will be imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court. If, as petitioner asserts, district judges have been imposing "more and more severe penalties" (Pappadio Br. 23) in recent years, the remedy lies with reviewing courts and with this Court. Juries do not determine sentences, and affording the right to trial by jury in contempt cases would not reduce the incidence of alleged "severe penalties."

III

PETITIONER PAPPADIO'S SENTENCE WAS REASONABLE

The grand jury in this case was investigating an organized conspiracy to import narcotics into the United States and had information that Thomas Lucchese was head of a group of people engaged in this activity and in other illegal enterprises (P.R. 106, 112). The investigation covered the wholesale distribution of narcotics in the New York area (P.R. 106, 112–133). Petitioner Pappadio was granted immunity under the Narcotic Control Act of 1956 and was questioned about Lucchese. After first refusing to answer questions, Pappadio admitted that he knew Lucchese but denied he knew anyone who dealt with narcotics. He also testified that since the service of the grand jury subpoena he and Lucchese had met with lawyers. He refused, however, to give the names of the persons who were present at these meetings or to relate where these meetings took place. The grand jury legitimately sought to discover the names of those peoples who were interested in Pappadio's grand jury testi-

mony. It was entitled to know whether others suspected of narcotics offenses were interested in Pappadio's testimony and whether his refusal to testify despite a grant of immunity was related to the refusal of other witnesses who did the same.[13]

The reasonableness of Pappadio's sentence cannot, we believe, be measured simply by balancing the number of questions he answered against those he refused to answer. The questions must be appraised in context in order to determine the seriousness of his contumacious behavior. This was primarily a task for the trial judge. It was appropriate for him to consider how substantial a sentence was necessary in order to obtain compliance with the order to testify. In an investigation involving a far-ranging narcotics conspiracy, such as this one apparently was, a substantial sentence was obviously needed to coerce significant testimony from a reluctant witness.[14] This

[13] In the same investigation, other witnesses, including Shillitani, similarly refused to testify. See *United States* v. *Castaldi*, 338 F. 2d 883 (C.A. 2); *United States* v. *Tramunti*, 343 F. 2d 548 (C.A. 2).

[14] Petitioner's alleged fear of a perjury indictment is in essence a reargument of an issue which this court declined to review when it limited its grant of certiorari. If the possibility of conflict between statements under oath in the course of the proceeding would be sufficient to raise the danger of self-incrimination of perjury which petitioner asserts, a witness in any civil or criminal proceeding could invoke the same claim after having given several answers under oath. A witness could, for example, under this theory, refuse to answer questions on cross-examination on the claim that those answers might be used against him on a perjury prosecution for testimony given during his direct examination. This is not, we submit, the sort of real hazard against which the privilege is designed to protect. Cf. *Hoffman* v. *United States*, 341 U.S. 479, 486–487.

Court has held that the trial court, in imposing sentence for a criminal contempt, "may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge." *United States* v. *United Mine Workers,* 330 U.S. 258, 303. Judge Medina, in dissent below, believed that the two-year sentence was "too much" (P.R. 226). That is a question which this Court must, of course, resolve on its own evaluation of the record in light of the standards announced in the *United Mine Workers* case, *supra.* Without suggesting that Judge Medina's conclusion was unreasonable, we call to the Court's attention the great importance of the grand jury's inquiry and the fact that petitioner persisted in his refusal despite repeated and specific instructions.[15] In light of these circumstances and the obvious desirability of obtaining compliance from other similar witnesses, we think the district court's judgment was a supportable one.

[15] For a chronology of the proceedings leading to the adjudication of contempt, see P.R. 72–74.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the court of appeals should be affirmed.

RALPH S. SPRITZER,*
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
NATHAN LEWIN,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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*In lieu of the Solicitor General who has disqualified himself.

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